IN THE

Supreme Court of the United States.

THE STATE OF TENNESSEE ON THE RELATION OF G. L. MALONEY, Et Als, *Plaintiffs in Error.*

vs.

STEPHEN P. CONDON, T. T. McMILLAN, JAMES RICH AND H. C. ANDERSON.

STATEMENT OF CASE.

Until February 8th, 1901, two of the relators, viz., G. H. Strong and T. A. Rambo were Pike Commissioners of Knox County, Tennessee, with terms of office expiring in January, 1902, two other relators Sam Vance and J. F. C. Harrell were Workhouse Commissioners of said County, with terms expiring in January, 1903; two others, S. L. England and I. N. White were Workhouse Commissioners of said County with terms expiring in 1902; another, R. L. Peters, was Superintendent of the Workhouse, whose term expired in January, 1902. There was only one other relator.

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The term of office of this remaining relator, G. L. Maloney, County Judge, expired September 1, 1902, as will be shown below where we state the expiration of defendant's terms. The record does not state expressly that the terms of Vance and Harrell as Workhouse Commissioners expired in January, 1903, but shows that they were elected in January, 1901, to serve till 1903. That is, their term was two years.

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The Statute of Tennessee under which they were elected made their term as alleged in the bill, two years, as the fol-

lowing quotation from it will show: "Two of said commissioners shall serve for the term of one year, and two for the term of two years; and annually thereafter the said quarterly Court shall keep said commissioners elected, by electing two commissioners for the term of two years. * * * *Act* 1891, *Chap.* 173, *Sec.* 1. *Shannon's Code of Tennessee, Sec.* 7401.

On the 8th of February, 1901, the General Assembly of Tennessee passed an act by which the management and control of County roads including turnpikes, and also of County Workhouses, in counties having a population of not less than 70,000 nor more than 90,000 under the present or any subsequent Federal Census, was vested in three public road commissioneds. *See Appendix hereto.* All the relators were, in February, 1901, road or workhouse officers in Knox County, except G. L. Maloney, who as County Judge, was *ex officio* chairman of the Workhouse Commission.

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The said Act of February 8, 1901, became operative at once in Knox County, effecting an implied repeal of the Statutes under which relators had charge severally, as shown, of the county roads and of the workhouse.

The Public Road Commissioners, appointed *pro tempore*, by the Governor under the provisions of the Act of 1901, entered upon the discharge of their duties, with the aid of a mandatory injunction, to Maloney, County Judge, as appears in the opinion of the Tennessee Supreme Court printed below, and thereupon these relators filed this bill charging that said Public Road Commissioners, the defendants in error, had usurped their offices, and that said Act of 1901, was in violation of the State Constitution, being vicious class legislation.

In the Court of Chancery Appeals and in the Supreme Court of the State the question was made without pleadings to support it, that said Act of 1901 was also violative of the XIV Amendment of the Constitution of the United States.

This cause was heard and determined on appeal from the

Chancery Court, by the Court of Chancery Appeals of the State of Tennessee with the cause of S. P. Condon et als. vs. George L. Maloney, Judge, as appears from the record in this cause.

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The Court of Chancery Appeals refers to and adopts its opinion in Condon vs. Maloney, as to certain important questions herein.

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Upon appeal to the Supreme Court of Tennessee, the two cases were heard and determined together, and the written opinion of that Court was decisive of both cases. That opinion is not included in the record brought up to this Court by the plaintiffs in error, and therefore we present it below in full as part of our brief.

The sole contention of plaintiffs in error in this Court is that the act of the Tennessee Legislature, viz., Chapter 8, Acts 1901, is invalid because it is violative of the XIV Amendment of the Constitution of the United States.

Returning to the subject of the expiration of the terms of office of the several parties to this suit, we reaffirm that the terms of all the relators have expired. This is sufficiently shown above from their own pleadings, except as to George L. Maloney, County Judge. But his term also expired in 1902. By Section 5, of Article 7, of the Constitution of Tennessee, it is provided: "Elections for judicial and other civil officers shall be held on the first Thursday in August, one thousand eight hundred and seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service. The term of each officer so elected shall be computed from the first day of September next succeeding his election." * * *

Const. Tenn. Art. 7, Sec. 5, Shannon's Code of Tenn. p. 75.

Thus all elections of State officers in Tennessee date from the first Thursday in August, 1870. Section 4, of Article VI, of the Constitution of Tennessee, is as follows:

"The Judge of the Circuit and Chancery Court, and other inferior Courts shall be elected by the qualified voters of the District or Circuit to which they are to be assigned. Every Judge of such Courts shall be thirty years of age and shall, before his election, have been a resident of the State for five years, and of the Circuit or District one year. His term of service shall be eight years."

Const. Tenn., Art. VI, Sec. 4, Shannon's Code of Tenn. p. 69.

Therefore the term of all inferior Judges in Tennessee is eight years, the periods constituting the terms being estimated from September 1, 1870, as shown above, and one of them expired in 1902.

A County Judge is a member of the State Judiciary.

State vs. Glenn, 7 Heisk. (Tenn. Rep.) 486.

A County Judge is an inferior Judge within the meaning of the Constitution.

State vs. McKee, 8 Lea, (Tenn. Rep.) 24.

It is explicitly decided by the Supreme Court of Tennessee that G. L. Maloney, Judge of Knox County, was a member of the Judiciary of the State, and entitled to hold for the eight year term as above set out.

State ex rel. Rambo vs. Maloney, 92 Tenn., 62.

It thus appears that all the relators have gone out of office by operation of law since this suit began.

It is also true that the term of office of the defendants has expired, under their temporary appointment and that their places must now be held by successors who have been elected, as will appear from the following quotation from the Act which this bill attacks, viz.: "As soon as this Act shall take effect the Governor shall appoint three (3) commissioners, who shall constitute the first Board of Public Road Commissioners. * * * The Commissioners so appointed by the Governor shall hold their offices until the next general election of county officers, when their successors shall be elected by the people, and every two (2) years thereafter said offices shall be filled by popular election" * * *

Chap. 8, *Act, Tenn.* 1901, *Sec.* 1, *p.* 10. *Appendix hereto.*

The Act was passed February 8, 1901, and approved same day, to take effect at once.

Acts Tenn., 1901, *p.* 18.

The Code of Tennessee provides that "Elections for all civil and judicial officers shall be held forever hereafter on the first Thursday in August next preceding the expiration of the respective terms of such judicial and civil officers, viz.: For Judges of the Supreme, Circuit, Chancery and other Courts, and Attorneys for the State in each Circuit or District every eight years; for justices of the peace in each civil district in every county every six years; for clerks of the Circuit, County and other Courts and for Register, every four years; for Sheriffs, County Trustees and Constables every two years, counting from the first Thursday in August, 1870."

Shannon's Code of Tenn., Section 1154, *p.* 369.

A simple mathematical calculation will show that an election for all these officers, except those holding six years, was held in August, 1902, that being the "next general election of county officers"—referred to in the quotation above from the Act of 1901.

Thus it is demonstrated that all the parties to this suit, both relators and defendants are now out of office. And as no fine or other penalty can be imposed on the losing party, your Honors are called upon to decide a purely academic question. No claim for damages can be made in this cause by either party. The Code of Tennessee expressly provides another action for the recovery of damages in proper cases of this kind.

Shannon's Code of Tenn., Sec. 5177.

It is true costs of suit may be imposed, but when this writ of error was taken it was known to plaintiffs in error when the terms of office of all parties would expire, the same appearing clearly in the Statutes of Tennessee. We present below, our reasons for insisting that the suit has abated and must be dismissed at the cost of plaintiffs in error.

ARGUMENT.

I.

RELATORS NOT NOW ENTITLED TO MAINTAIN THIS SUIT.

We submit with confidence that as the terms of office of all parties to this suit have expired, as no fine can be imposed, and as the dates of the expirations of the several terms of office of the parties were matters of plain statutory law when this writ of error was sued out, the plaintiffs in error can no longer maintain the suit.

Conceding that this action lies for the purpose for which it was instituted, it is certain that plaintiffs in error are not now entitled to hold any office, and that the terms of office of the defendants in error, have likewise expired. The defendants in error are ousted as effectually as if the ouster had been accomplished by the mandate of this Court. The Court can not restore plaintiffs in error to any office nor award them damages; it can not oust defendants in error, because they are no longer in office.

It is true of course that if the case were a proper one for such action this Court might pass upon the abstract question of the constitutionality of said act of 1901, and declare the same god or bad, as the law may be, despite the fact that no personal interest of any party to the suit would be affected by this decision.

If cases justifying such action be conceivable this certainly is not one of them.

The original proceeding in this cause was not a writ of *Quo Warranto*, nor an information in the nature thereof, but a substitute proceeding. Neither *Quo Warranto* nor the information in the nature thereof was ever in force in Tennessee.

Martin and Yerger (*Tenn. Rep.*) *p.* 286.

State vs. McConnell, 3 *Lea* (*Tenn. Rep.*) *p.* 335.

The substitute proceeding is a bill in equity brought by the State through an authorized officer, or by such authorized officer in the name of the State upon the relation of a private party.

The assumed authority for resorting to this process in this case is in sub-section 1, of Section 5165, of Shannon's Code of Tennessee, where the following language is used, stating in what cases the action lies, viz.: "Whenever any person unlawfully holds or exercises any public office or franchise within this State." * * *

Shannon's Code, Sec. 5165, *Sub-Sec.* 1, *p.* 1311.

The Code of Tennessee provides for bringing this action by private persons as follows: "It is also brought on the information of any person upon such person giving security for the costs of the proceeding," * * *

Shannon's Code, Sec. 5169.

Leave of Court to file the bill is not necessary.

8th Lea, Tenn. Rep. pp. 76-77.

The only judgment authorized by the statute is exclusion from office, with the payment of the costs of the suit. The statute upon this point is in the following language, "When a defendant whether a natural person or a corporation, is adjudged guilty of usurping, unlawfully holding, or exercising any office or franchise, judgment shall be rendered that such defendant be excluded from the office or franchise and that he pay the costs.

Shannon's Code, Sec. 5180.

The Statutes authorize no other judgment and, we think, admit of no other.

As showing that the action when brought by a relator is purely a personal one, in substance, we quote the following statute of Tennessee, "Should the relator die pending the action, the suit abates, unless by the second term thereafter, it is revived in the name of some person, who on application and giving security for costs is substituted in the place of the deceased relator. * * *

Shannon's Code, Sec. 5184.

It seems clear that as the death of the relator abates the action, the termination of the relators interest in it, must have the same effect, and especially does this construction seem imperative when not only have the relators, as in this case, lost all interest in the ouster of the defendants, but the defendants are, already out of office and a judgment of ouster can not be rendered.

Upon the subject of the judgment to be rendered, the Supreme Court of Tennessee uses the following language: "These provisions are specific and clear that the matter in contest to be decided is the usurpation of the office or franchise; and the judgment, exclusion from that office or franchise and the money judgment to be given is for costs, and the damages, if any have accrued, are provided for in another suit to be brought within a year after the judgment."
* * *

Scott vs. Cummings, 5 Heisk. Tenn. Rep., pp. 613-614.

The results of the statutes and decisions just quoted seem to us to be that this action is essentially a personal or private one, abating on the death of the relator or person promoting it, and, inferentially, abating also upon the cessation of his personal interest in it; that the only prescribed, or possible judgment is removed from office; that the joinder of the State is a form which has no significance or substantial legal effect; and that the suit must now abate as it is impossible to accomplish the only result for which it could have been brought legitimately, and your Honors are called upon by plaintiffs in error to decide a grave constitutional question, in order to dispose of a trivial cost bill, improvidently incurred.

The unreality of the state's connection with the prosecution of this suit, is the more apparent when it is remembered that, its legislature passed the act of 1901, its Governor approved the act, and its Supreme Court has declared the act constitutional.

In High on Ex. Leg. Rem. it is said: But when the

relator seeks by information not only to oust respondent but also to establish his own right to the office, he must show both his interest in and title to the office, etc

High Ex. Leg. Rem. (3rd Ed.)*Sec.* 360 *citing State vs. Boal,* 46 *Mo.,* 528; *Andrews vs. State,* 69 *Miss.,* 740.

The same author says: "Ordinarily it would seem to be a sufficient objection * * * that the case is one in which the court can not give judgment of ouster even should the relator succeed."

High on Ex. Leg. Rem. (3rd Ed.) *Sec.* 644.

The final prayer of the bill in this cause is that defendants in error be required to surrender and turn over to the rightful owners thereof all the emoluments, etc., of their offices.

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That the state is not in any real sense a party to a suit of this kind was in effect declared by this Court in *Miller vs. State,* 12 *Wallace,* 159, passing upon a motion to advance a cause on the ground that a state was a party. The motion to advance was refused because the relators were the real parties plaintiff.

We have examined the decision of this Court in the case of the *United States vs. Boutwell,* 17*th Wallace,* 604, and rely upon it as supporting our general proposition that this suit must abate. It is true that that was a mandamus case, but the rule recognized in it, as to abatement, would seem to be applicable in all respects to a case of this kind. No special provision as to costs appears in the opinion in that case, but as the suit was abated it is assumed that the costs followed the dismissal. We can conceive of no reason why the present proceeding should not be dismissed at the cost of the relators as the abatement here will be destructive of the entire case and there is no possibility of a revivor.

II.

CLASS LEGISLATION.

On the subject of class legislation, and the alleged violation of the constitutions of Tennessee and of the United States, by the said Act of February 8, 1901, we adopt as our argument and print here, in full, the opinion of the Supreme Court of Tennessee deciding this case and the connected case of Condon et als. vs. G. L. Maloney, County Judge, viz.:

Filed November 9, 1901, J. G. Stuart, D. C.

S. P. Condon, et al, vs. G. L. Maloney, County Judge and State, ex rel, vs. S. P. Condon, et als.

OPINION.

These are consolidated causes. The first is a proceeding by mandatory injunction, to compel the defendant Maloney, as County Judge, to examine and approve the bonds of complainants as road commissioners of Knox County, they asserting claim to that office, by virtue of an appointment by the Governor, pursuant to the provisions of an act of the last session of the Legislature. (Acts 1901, ch. 8, p. 10.) In their bill, it is alleged that they had tendered to the defendant, the bonds executed in all respects as required of them by the 15th section of the act, for his approval as County Judge, and that he had declined to examine or approve them, upon the sole ground assumed by him,-that the act was void, for unconstitutionality,—and the prayer of the bill is that a mandatory injunction be awarded to require him to discharge the duty of examination and approval as one merely ministerial. In accordance with the prayer, a writ of mandatory injunction was awarded. Subsequently a demurrer calling in question the right of the complainants to this injunction and challenging the constitutionality of the Act was filed, and upon argument overruled. The defendant declining to make further defense, a final decree was entered, affirming the right of the com-

plainants to the relief sought. From this decree, an appeal was prayed and granted.

The second of these causes is a statutory proceeding in the nature of a quo warranto, brought after defendants, (who are the complainants in the first named case) had been inducted into office, as the result of the mandatory injunction referred to, on the relation of the removed officials, assailing the title of the defendants to the office of Public Road Commissioners, and seeking reinstatement of the relators. The attack of the relators on the title of the defendants is based, on the assumed unconstitutionality of Ch. 8 of the Acts of 1901. Upon demurrer the bill was dismissed, and the relators appealed.

The causes was heard by the Court of Chancery Appeals, and the decree of the Chancellor in each was affirmed. From these decrees of affirmance, the defendant Maloney, in the one, and the relators in the other of these cases, have prosecuted appeals to this court.

The questions involved in the two causes, are the same save in the first, it is insisted for the defendant Maloney that the action of the Chancellor in awarding the mandatory injunction was arbitrary and unauthorized, and this court is earnestly asked to so pronounce.

Rare as is the use of this extraordinary process, yet the power of the Chancellor to grant it, in a proper case, is recognized in equity practice, and we are not prepared to say that there was here an abuse of discretion.

But if it was conceded the writ should not have been awarded, yet it appears from these records that it was obeyed by the County Judge in the examination and approval of the bonds submitted to him, and the complainants were inducted into office. This being done, the writ spent its force, and a reversal of his decree in that regard, could not undo what has been done. This being so, it would be an idle ceremony, even if disapproving the Chancellors action, to enter such a decree.

This brings us to the more serious questions raised by these appeals.

The Act, the constitutionality of which is challenged by the respective appellants, is entitled an Act to Create a Board of Public Road Commissioners, to regulate the laying out and working of public roads in this State in counties having a population of not less than 70,000 and not more than 90,000, under the Federal Census of the year 1900, or any subsequent Federal Census, and to provide a method for the management and control of county workhouses in counties coming under the provisions of this Act."

It is a well established canon of constitutional construction, and certainly is now axiomatic in this State, that he who seeks to have a legislative Act declared void on the ground that it is violative of the constitution, must be prepared to place his finger upon the clause which vitiates it. For as was said by Caldwell, J., in *Cole Mfg. Co., vs. Falls*, 90 *Tenn.* 468. "All intendments are in favor of the constitutionality of an Act of the Legislature, passed with the forms and ceremonies requisite to give it the force of law. * * * Every reasonable doubt must be solved in favor of the legislative action."

Bearing this rule in mind, we come now to the consideration of the act in question.

In the first place it is said that this is vicious class legislation passed in violation of Article XI, Sec. 8, and Article 1, Sec. 8, of the State constitution, and the XIV Amendment to the Federal Constitution. These several sections are so familiar it is not worth while to set them out here.

In Harbison vs. Knoxville Iron Co., 103 *Tenn.*, 421-431, it is said that the phrase, "by the law of the land" as used in Section 8, Art. 1, of the State constitution is the exact equivalent of the terms "due process of law," as used in the Federal constitution, and it is asserted in the argument of the counsel for the appellants, "that whatever is forbidden as vicious class legislation by the State constitution is likewise forbidden by the XIV Amendment to the constitution of the United States."

We will then first refer to one or more of the leading cases, decided by the Supreme Court of the United States, involving the question of legislative classification, and ascertain the rule adopted by that court.

In Magoun vs. Ill. Trust and Savings Band, 170 *U. S.,* 282, was raised the question of the constitutionality of the inheritance tax law of the State of Illinois. That Act classified successions, and fixed the rate of taxation upon them in substance as follows: "1st. When the beneficial interest to any property or income therefrom should pass to or for the use of a father, mother, husband, wife, child, brother, sister, wife or widow of the son, etc., in every such case the rate of tax should be one dollar on each one hundred dollars of the market value of the property received by such persons, provided, however, that any estate of less value than twenty thousand dollars, received by such person, should not be the subject of this tax." 2. When the beneficial interest to any property passed to or for the use of any uncle, aunt, etc., in any such case the rate of such tax should be two dollars on every one hundred dollars of the market value of such property received by each person, in excess of two thousand dollars, so received; and 3rd, in all other cases, the rate should be on each one hundred dollars of property received, as follows: on all estates of ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars, and on all estates over fifty thousand dollars, six dollars, etc.

This act was attacked as vicious class legislation, it being insisted, that it was necessarily arbitrary and its provisions as causing discrimination and creating inequality of burdens of taxation, in violation of the Fourteenth Amendment, which prohibits a state denying to any citizen the equal protection of the laws.

To this contention, the Court speaking through McKenna, Justice, said, "What satisfies this equality has not been and probably can never be defined. Generally it has

been said that it 'only requires the same means to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.'" *Kentucky Railroad Tax Cases*, 115 *U. S.*, 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. * * * It may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude, as far as interference by this court is concerned. * * * In other words, the State may distinguish, select and classify objects of legislation and necessarily this power must have a wide range of discretion."

And so it was, the Court held that the Act did not infringe upon the Fourteenth Amendment, though it relieved absolutely persons who belonged to the first class and yet came into property of a less value than twenty thousand dollars—while it placed the burden upon all others of that class succeeding to property of greater value than twenty thousand dollars, and not only placed a still heavier burden upon those belonging to the second and third classes, but graduated this burden among those belonging to these classes, according to the value of their respective successions. Yet, we think, it might possibly be difficult to assign any satisfactory reason why a person of the first class receiving an estate of twenty thousand dollars should pay this inheritance tax, while another person of the same class received a dollar less should be relieved from it, and so with regard to the discrimination made in other cases.

Nor did the court attempt to assign any reason for the difference. On the contrary, it said, "There is * * * no precise application of the rule of reasonableness of classification, and the rule of equity permits many practical inequalities. * * * It only requires that the law * * * shall operate on all alike under the same circumstances."

Thus in substance, using the language employed in so many of our cases which deal with the two clauses of the State Constitution in question here.

In Orient Insurance Co. vs. Daggs, 173 *U. S.*, 557, was involved a statute of Missouri providing that in suits upon policies of insurance against loss by fire, the defendant shall not be permitted to deny that the property insured was worth at the issuance of the policy, the full amounts covered by the policy; and in case of total loss, that the measure of damages should be the amount at which the property was insured less depreciation in value between the time of issuing the policy and the time of the loss, and the burden of providing such depreciation should be on the defendant, etc.

It was objected that this statute was passed in violation to the Fourteenth Amendment of the Federal Constitution, in that it discriminated, "as to the subject matter, as to the parties, as to the mode of trial of actions at law and equity and imposes upon this particular class of underwriters, as distinguished from all the rest of the world, conditions which abrogate the contracts, compel it to pay damages never sustained, and prevent it from having an investigation upon the trial by due process of law."

The court in disposing of this contention refers to the case of *Magoun vs. Illinois Trust and Savings Bank*, supro, as containing a late review of the subject, and adds, "We said in that case that the State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion. And this because of the function of legislation and the purposes to which it is addressed. Classifications for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It sufficies if it is practical and is not reviewable *unless palpably arbitrary*." The Court then concludes, "the classification of the Missouri statute is certainly not arbitrary."

Without citing other cases from that Court, it will be sufficient to say, that an examination of the United States Supreme Court reports will show that the Court has failed

not only to declare all legislative classifications to be obnoxious to the Amendment in question, but on the other hand, has recognized many State laws classifying property of persons, in their respective relations, as outside the inhibition of the Amendment. The theory upon which this holding rests, is thus stated by Field, Justice, "The greater part of all legislation is special either in the objects sought to be obtained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas * * * laws for the irrigation and drainage of particular land * * * are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character * * * . And when legislation applies to particular bodies or associations imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them for the amount of their work and a law requiring Railroad Corporations to erect and maintain fences along their railroad * * are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment if all persons subject to it are treated alike, under similar circumstances and conditions in respect both of the privileges conferred and liabilities imposed."

So we are satisfied that this act does not in any regard infringe the Fourteenth Amendment to the Federal Constitution, as it operates upon all counties in like conditions, with uniformity, and can not be said to be palpably arbitrary. The same rule of construction that saves it in this regard will protect it from the condemnation of Section 8 of Article 1 of the constitution of the State. For a classification is safe as against this provision, when, as this does, it embraces equally all counties which are now or hereafter may be in

like conditions. *Stratton vs. Morris*, 89 *Tenn.* 534, *Harbison vs. Knox. Iron Co.*, 103 *Tenn.* 747.

Is the Act violative of Article XI, Section 8, of the State constitution, in that it grants to, "one individual or individuals, rights, privileges, immunities or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of the law."

It applies alike to all, "counties having a population of not less than 70,000 and not more than 90,000, under the Federal Census of the year of 1900 and subsequent Federal Census." By its terms it applies with uniformity to all counties which had the requisite population at the time of passage of the Act, and to all such as hereafter may fall within its provisions, as indicated by it.

The question of the constitutionality of legislation providing for a classification of towns, cities, and counties, with the view to the operation of particular statutes has long since been put at rest by the decisions of this State. Perhaps no statutes have been more stubbornly contested, than those at stake in *Luerhman vs. Taxing District*, 2 *Lea*, 245, and *Cook vs. State*, 90 *Tenn.*, 407, yet both provided for classifications resting for population upon the Federal Census, and both were upheld.

The first of these cases called in question a series of Acts constituting however a system, beginning with the Act repealing the character of certain municipal corporations (1879 Ch. 10) and ending with the Act to establish Taxing districts (1879 Ch. 11), and the Act amendatory thereof (1879 Ch. 84) and the second the "District Law," Ch. 24, Ex. Ses. 1890.

But it is said the Acts in controversy in these cases, are to be distinguished from the one at bar in the present case.

We do not think so. We are unable to discover how the case of *Cook vs. State*, supra, can be maintained and the Act now in question, be annulled as capricious and arbitrary. In essentials they are the same, and the one can not stand while the other falls.

But it is urged that no reason has been assigned, for limiting the operation of the Act of Counties, "having a population of not less than 70,000 and not more than 90,000," and thus necessarily excluding the counties of Shelby and Davidson, each having a population, according to the Federal Census, largely in excess of 90,000. To this objection it may be said, as to Davidson, that the legislature may have found as a reason for its exclusion that it was covered by turnpikes, built and controlled by private chartered companies, and in the matter of Shelby that the public has already perfected a network of good roads, under a system entirely satisfactory.

But while the Courts frequently find and assign reasons for legislative classification, yet it is by no means uniformly so. And it does not follow because the reason for the classification is not disclosed in the face of the Act that it is necessarily without reason and capricious. Reasons eminently wise and provident might control the law making body, which do not appear upon the fact of the statute, and for the courts to strike it down, because not readily perceptible, might well be criticised as an act of judicial usurpation. Nor is there any abdication of constitutional duty or responsibility in this action.

The true question in each case is, is the classification capricious, unreasonable or arbitrary?

As is said in the opinion of the court by Caldwell, J., in *State ex rel vs. Schlitz Brewing Co.*, 104 *Tenn.*, 715, 731, "Class legislation is of two kinds, namely that in which the classification is natural and reasonable, and that in which the classification is arbitrary and capricious." The Court then refers to the case of *Magoun vs. Ill. Trust and Savings Bank*, supra, and *Orient Ins. Co. vs. Dragg*, supra, with approval, and with regard to classification embodies from the latter case a sentence already quotted that, "it suffices if it is practical and is not *reviewable unless palpably arbitrary.*"

This is the later utterance of this court, upon this vexed question, made after a careful collation and consideration of the cases, and we are satisfied of its soundness.

Applying this criterion to the statute we are satisfied that, it is not vicious classification."

But it is said that this statute is void, because, while general in its terms, yet as a matter of fact only the county of Knox falls within its provisions when passed.

The same objection would and in fact was made in the case of *Luerhman vs. Taxing District,* supra, that only the City of Memphis, fell within the provision of the Acts there in question and in the case of *Cook vs. State,* supra, that only two counties in the State could avail themselves to the district law, and in *Peterson vs. State,* 104 *Tenn.,* 127, that the no-fence-law (Ch. 23, Acts 1899), applied only in counties of the State having a population of 59,000 or more by the Federal Census of 1890, etc., but in each case the objection was overruled. These cases were decided after careful deliberation, and we see no occasion to question their absolute correctness.

Again, it is insisted that the statute is void, because in violation of Article XI, Sec. 17, of the State constitution, in that it includes two distinct subjects, to-wit: public roads and workhouses.

In *Cannon vs. Mathes,* 8 *Heisk.,* 504, the Court quoted with approval from Judge Cooley on Constitutional Limitations, as follows, "The general purpose of these provisions is accomplished when the law has but one general object which is fairly intended in the title. To require every end and all means necessary or convenient for the accomplishment of this general object to be provided by a separate Act relating to that alone would not only be unreasonable, but would actually make legislation impossible. * * * The generalityof the title is no objection to it so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment, can be considered as having a necessary or proper connection."

Many illustrations of the application of this rule of construction may be found scattered through our reports. Among these are the cases of *Cole Mfg. Co. vs. Falls,* 90

Tenn., 466; *Ryan vs. Terminal Co.*, 102 *Tenn.*, 125; *State vs. Brown*, 103 *Tenn.*, 450. It will be unnecessary to examine these cases in detail. It is sufficient to say that they recognize the rule as stated by Judge Cooley and supported in *Cannon vs. Mathes*, supra, or else the same rule stated in different languages in *Sutherland on Statutory Construction, Sec.* 93, as follows: "Where the title of a legislative act expressed a general subject or purpose, * * * all matters which are naturally and reasonably connected with it, and all measures which will or may facilitate the accomplishment of the purpose so stated and properly included in the Act and are germane to its title."

On this point we adopt the language of the brief of counsel for appellees: "Not only is it true historically that working convicts on roads is a part of the public policy of the State, but it is also true, that it has the sanction of positive law."

See Shannon's Code, Sec. 1642, *Acts* 1891.

Here it is expressly declared that all persons confined in county jails or workhouses shall be available to the Commissioners for the purpose of working on public highways.

Thus the two subjects of public roads and of workhouses have been connected in the history and in the legislation of Tennessee until it is fair to say that the connection has become organic, and it is entirely within the power of the legislature in seeking to secure good roads, to place these two matters, thus connected, under one control; it is proper that the Commissioners who must work the convicts on the roads, should have the control of the convicts. A divided jurisdiction is always unsatisfactory and injurious." We therefore think this objection is unsound.

Finally, it is said that the Act is violative of Sec. 17, Art. XI, of the Constitution, which forbids the filling of a county office created by the legislature otherwise than by election of the people or by the County Court, in as much as it authorizes the Governor to appoint the Commissioners constituting the first board, who shall hold their office until the next general election.

The appointment provided for in the Act is temporary in character. Its object is to place the new system in operation without delay. A question very similar in principle was considered by the Supreme Court of Michigan in *People vs. Hurlburt*, 24 *Mich.*, 44. The opinion inthat case was delivered by Judge Cooley, who, while expressing a doubt whether the legislature could constitutionally appoint for a municipal corporation, when the constitution contained express provision for their local appointment, officers, whose duties were exclusively local; yet held that it was entirely competent for that body to make provisional appointment of such commissioners to put the new system in motion.

But independent of the authority of that case, we have no doubt that the legislature had the power to vest in the Governor this right of temporary appoint. Sec. 4 of Art. VII of the Constitution provides that, "The election of all officers and the filling of all vacancies not otherwise directed or provided by this constitution shall be made in such manner as the legislature shall direct."

The term "vacancies," as used in the constitution has in a recent case been defined by this Court. In *State ex rel. vs. Maloney*, 92 *Tenn.*, 62, it is said the word "vacancy" covers equally a case "where the appointment or election may be made to fill an office for the first time and where it may be made to fill one whose previous incumbent has died, resigned or been removed.

In State ex rel. vs. Glenn, 7 *Heisk.*, 472, it was insisted that the office of County Judge was a county office, and that one appointed by the Governor to fill a vacancy occasioned by the death of a late incumbent was not entitled to serve by reason of the provision of Section 17 of Art. 41. To this the Court replied: "Assume for argument that 'this section' may include a county judge, does it prohibit a temporary appointment by the Governor until the next election? It says that the office shall not be filled otherwise than by the people or the County Court. Other portions of the Constitution provide that the Judge of the Circuit and other Courts shall be elected by the people. This is certainly equivalent to

saying that the office shall not be filled otherwise than by the people and the constitution has no provision for the filling of a vacancy in the office of a judge by an appointment of the Governor, but it does contain a provision that the election of all officers and the filling of vacancies not otherwise directed or provided for by this constitution, shall be made in such manner as the legislature may direct, and under this power the legislature directs the appointment to be made by the Governor. * * * The provision that the office (of Judge) shall only be filled by the voters, has not been supposed to take away the power of the Governor to fill a temporary vacancy." And we are satisfied that the contention that the same provision operates to prevent the legislature from conferring upon the Governor the power to fill a temporary vacancy existing in the office of road commissioners, in the institution of this new system is unsound.

It is not improper to say before closing this opinion that the *State vs. Glenn*, supra, is cited with approval in the *Judge's cases*, 102 *Tenn.*, 547, but by a typographical error, McAlister, J., is made to say that the provisions of the constitution in question, "relates only to the mode of filling a temporary vacancy."

The decree of the Court of Chancery Appeals in each of the causes is affirmed.

BEARD, J.

Office of Clerk of the Supreme Court,
For the Eastern Division of the State of Tennessee.

I, Alex McMillan, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the opinion of said Court, pronounced at its September term, 1901, in case of S. P. Condon et al. vs. G. L. Maloney, County Judge, and State, ex rel. vs. S. P. Condon, as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in Knoxville, on this, the 14th day of January, 1903.

(Seal) ALEX McMILLAN, Clerk.
By J. G. STUART, D. C.

III.

THERE IS NO FEDERAL QUESTION.

The exhaustive and convincing opinion of the Supreme Court of Tennessee, as to the bearing of the XIV Amendment of the Constitution of the United States upon said Act of February 8, 1901, would, we think, be sufficient if there were now a federal question in the case, but we submit with confidence that there is no such question remaining. The plaintiffs in error attack the Act of 1901 because it applied only to Knox County at the time of its passage. This may be conceded, and it follows that in a sense the act is class legislation, but we need not offer arguments or cite authority to show that class legislation is not necessarily vicious. The leading cases on the subject are cited in the opinion above.

If this act be vicious it is so, solely by reason of the fact of its original applicability to only one county, and not because it may not affect all other counties coming into the same category with that one county.

If the act invades any rights of relators, they are rights of State citizenship and not of national citizenship, and therefore are not protected by the XIV Amendment.

Brannon on XIV Am. p. 56.

Slaughter House cases, 16 *Wall.* 36.

Holden vs. Hardy, 169 *U. S.*, 366.

Without enlarging upon the proposition that the rights involved in this litigation are those of state citizenship and not of United States citizenship, we rely confidently upon that proposition for the defeat of this suit in any event. Fortunately there is authority which supports the proposition generally, and applies in a striking way to the particular facts of this case. In the case of *Holden vs. Hardy,* 169 *U. S.* on page 387, Mr. Justice Brown delivering the opinion quotes and approves the following from the case of *Missouri vs. Lewis,* 101, *U. S.*, 22, 31: "We might go still further and say, with undoubted truth, that there is nothing in the consti-

tution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its methods of procedure for the rest of the State, there is nothing in the constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. * * * The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same state."

We submit that the principle announced in this quotation meets every conceivable objection to the Tennessee Act of 1901, that can be urged in this case. We repeat that the sole objection now made or that can be made is that the said Tennessee Act applied only to Knox County at the time of its passage.

It has been decided many times by this court that it will follow the state courts in the construction of state constitutions. The rule is so well established that we consider it necessary to cite only one authority, viz.: "We may think that the Supreme Court has misconstrued its constitution or statute, but we are not at liberty to, therefore, set aside its judgments. That Court is the final arbiter as to such questions."

Forsyth vs. Hammond, 166 *U. S.*, 518-519.

It being thus established that the Supreme Court of

Tennessee is the "final arbiter" in the construction of the constitution of Tennessee, we assert next that when that court has decided that any particular legislation is authorized by the constitution of Tennessee such particular legislation has a constitutional warrant which is in every way, for every purpose, equivalent to an express warrant therefor, written in the constitution of the state itself. In other words, this act is not invalid because it applies or applied originally, to only one county, any more than it would have been invalid if it had been passed in pursuance of express words in the constitution authorizing legislation applicable to only one county. The power to enact legislation of this kind is, since this decision of the Supreme Court of Tennessee as much a part of the constitution of Tennessee as if the Constitutional Convention had written the power in the constitution itself. It follows, we submit, that this Court will not review the action of the Supreme Court of Tennessee in this case unless the opinion of that Court approves something which is inherently wrong or violative of natural right or of established constitutional principles, and we affirm with confidence that this particular legislation in no way transcends the right of the state as declared in the quotation from *Holden vs. Hardy* above set out.

It may illustrate our meaning to call attention to the fact that Section IV, Article X, of the Constitution of Tennessee provides a method for establishing new counties and prescribed the conditions under which they be established, but immediately proceeds to make various exceptions applicable only to particular counties or parts of counties. For instance, on *page* , *Shannon's Code of Tennessee*, it will be found that Bledsoe County is excepted entirely from the provisions applicable to other counties in the following language:

"No part of Bledsoe County shall be taken to form a new county or a part thereof, or to be attached to any adjoining county." Again, on *page* 78, *Shannon's Code* at the end of the second paragraph, being part of said Section IX, Article X, is the following: "But the foregoing provision

requiring a two-thirds majority of the voters of the county to remove its county seat shall not apply to the counties of Obion and Cocke." Referring to this last quotation, it is very certain that the exception there declared is far more violative of equality and of the rule against special laws and class legislation than the act now under consideration, but we assume that no one would think of contesting the validity of the provision. Again, in Section XIII, Article XI, of the Constitution of Tennessee, it is provided as follows: "The General Assembly shall have power to enact laws for the protection and preservation of game and fish within the state, and such laws may be enacted for and applied and enforced in, particular counties or geographical districts designated by the General Assembly."

Shannon's Code, p. 48.

We say again that the Knox County Road Law, which is now attacked, having been declared constitutional by the Supreme Court of Tennessee can not now be held unconstitutional as violative of the XIV Amendment of the Federal Constitution any more than the express provisions of the state constitution applicable to particular counties, that we have quoted.

The result, as we see it, is that your Honors are now called upon, in reality, not to declare said Tennessee Statute of 1901 obnoxious to the XIV Amendment of the Federal Constitution, but to reverse the action of the Supreme Court of Tennessee in holding it permissible under the constitution of Tennessee.

It is respectfully submitted that the suit of relators must be dismissed and all relief denied them.

CHARLES T. CATES, JR.,
JOSHUA W. CALDWELL,
Solicitors.

APPENDIX.

Caption and Section 1 of Chapter 8, Acts of Tennessee, of 1901, from pages 10 and 11 of published Acts of Tennessee, 1901.

CHAPTER 8.

HOUSE BILL NO. 369.

AN ACT to create a Board of Public Road Commissioners, to regulate the laying out and working of public roads in this State, in counties having a population of not less than 70,000 and not more than 90,000, under the Federal Census of 1900, or any subsequent Federal Census, and to provide a method for the management and control of county work houses in counties coming under the provisions of this Act.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That in all counties of this State, having a population of not less than 70,000, and not more than 90,000 under the Federal Census of the year 1900, or any subsequent Federal Census, there shall be, and is hereby created a Board of Public Road Commissioners. Said Board shall be composed of three (3) members, citizens of the county to be chosen as hereinafter set out. As soon as this Act shall take effect, the Governor shall appoint three (3) Commissioners, who shall constitute the first Board of Public Road Commissioners, and in appointing said Commissioners the Governor shall designate one of said appointees as Superintendent of Public Roads, and the others as associate members of said Road Commission. The Commissions so appointed by the Governor shall hold their offices until the next general election of county officers, when their successors shall be elected by the people, and every two (2) years thereafter said offices shall be filled by popular election, the candidates to be designated on the official ballot by the titles herein declared. No county officer shall be eligible to a place on the Commission. The duties of said Public Road Commissioners shall be to take charge of and control

all public roads and bridges of the county; to receive from the proper officers, and to disburse funds collected by taxation or otherwise from the repairs or construction of macadam roads, improved highways and bridges. They shall also have control and management of the workhouses in the counties coming under the provision of this Act which have workhouses, provided that al lorders heretofore adopted bv the County Court, and of record relating to the assignment of the workhouse convicts to certain roads shall be complied with by said Board of Public Road Commissioners. They shall have the power to open and close roads as hereinafter provided. The Commissioner who shall be appointed Superintendent of Public Roads, and who shall thereafter be elected to that office, shall receive a salary of fifteen hundred ($1,500.00) dollars a year, and the associate members of said Commission shall receive a salary of three hundred (300.00) dollars a year each, to be paid out monthly of the treasury of the county upon warrant of the County Judge or Chairman. Two members of the Board shall constitute a quorum for the transaction of business. * * *

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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 209.

STATE OF TENNESSEE *EX REL.* G. L. MALONEY ET AL.

vs.

STEPHEN P. CONDON ET AL.

ANSWER OF DEFENDANTS IN ERROR TO PETITION TO REHEAR AND REVIVE.

It is stated in the petition to rehear and revive that the question upon which the court's decision dismissing the writ of error in this cause is based was brought to the attention of counsel for petitioners and relators for the first time on the day of the argument of the cause. It is respectfully submitted that for this fact defendants in error are not responsible, the question being one of law arising from the obvious facts of the case. It is further stated in the petition that the brief on behalf of defendants was not filed within the time required by the rules of the court, and did not reach counsel for petitioners in time to admit of reply by

brief. Defendants have no record before them to show when their brief was filed, but rule 21 requires that defendants in error file their briefs with the clerk of this court at least three days before the case is called for hearing, and it is the positive recollection of defendants that their brief was filed more than three days before the hearing. The hearing occurred on the 12th and 13th of March, 1903, and defendants understand and aver that their brief was filed on the 6th of March. However that fact may be, no exception was taken by plaintiffs in error on the hearing or before. Further answering said petition, according to the paragraphs thereof, defendants say:

I.

That in paragraph one of their petition the plaintiffs ask the court to assume that plaintiffs still hold the offices to which they were elected, as shown in the record, by reason of the fact that chapter 8 of the Acts of 1901 of Tennessee is unconstitutional. There are no facts in the record upon which to base such a claim. All the pleadings were prepared before the expiration of the several terms of office of relators. This court does not know whether or not the county court of Knox county or the people in the case of The County Judge elected the successors of plaintiffs in error at the time when their terms of office expired under the old law. There is no allegation in the pleadings that successors were not elected, and there is no proof to that effect anywhere in the record. The petition to rehear, therefore, is in effect an amended bill which plaintiffs now seek to file in this court. Your honors have said that you will not

assume that relators "would hold over," and this was in response to argument made at the hearing. You are now asked in face of this express declaration in the opinion to assume that they would hold over. The holding of the court on this point was obviously right and must be maintained now, we submit, for want of allegations in the pleadings or proof to show that they do hold over. Attention is called to the fact that it is not alleged in the petition now filed that no successor of any of the relators has been elected, but instead there is a hypothetical allegation that they hold over, which defendants desire to traverse if these pleadings are now to be recast.

II.

Petitioners insist that this is a public action to be prosecuted by a public prosecutor. Your honors have already held that "in the circumstances this case assumed the aspect of a civil contest between individuals and not of a prerogative writ to correct usurpation of office" (Opinion, p. 4). The nature of this action was discussed at some length in the brief for defendants heretofore filed, and they are content to rely upon the authorities there cited, and more especially upon the holding of the court above referred to.

Plaintiffs likewise seek in paragraph two of their petition to amend their bill by alleging that Stephen P. Condon, who was originally appointed chairman of the road commission of Knox county, was, at the election provided by said act in August, 1902, elected to said office, and has held the same ever since, and is holding the same at this time, and that defendant, H. C. Anderson, is still holding the position of

superintendent of the workhouse of Knox county under and by virtue of appointment under said statute. It is respectfully submitted that this amendment of the bill, like the one above referred to, is inadmissible in this court, as in cases of this kind certainly the jurisdiction of this court is purely appellate, and the cause must be tried upon the record brought to this court by plaintiffs.

Plaintiffs further seek to amend their bill, and, in effect, to bring a new suit by alleging that R. W. Parker and Fletcher Adams were at the August election, 1902, elected members of said road commission in lieu of the defendants McMillan and Rich. Defendants deny the right of plaintiffs to make this amendment of their pleadings, and to bring Messrs. Parker and Adams into this suit as parties defendant under any circumstances, but more especially after the cause has been fully heard and has been determined by your honors. The judgment to be rendered in this cause is, in the language of the supreme court of Tennessee, "exclusion from that office or franchise and the money judgment to be given is for costs."

State *ex rel.* Curry *vs.* Wright, 5 Heiskell, 612.

It would certainly be a unique proceeding, wholly unprecedented, to bring Messrs. Parker and Adams into the cause at this stage of the proceedings, and, in the event of a decree in favor of plaintiffs, to charge said new parties with the costs of this proceeding.

III.

It is further submitted that there is nothing in this record to show that if said act of 1901 were held unconstitutional the law under which relators were originally elected would again become operative so as to justify the court in deciding that relators hold over.

IV.

As the allegation in the petition the relators held over necessarily involves the statement that no successor to any one of them has been elected, in the event your honors should give any consideration to this attempted amendment of the pleadings, it is obviously fair that as the question is one of fact the defendants should be allowed an opportunity to plead to the allegation. Defendants do not at this time consider it necessary to make any averments as to the facts of the cause, but they submit that they have a clear right to plead to these new allegations before this court or any other court passes upon them. This court will not render a judgment *pro confesso* against defendants on the amended bill when they are not in default, but are asking as they do now that if these new facts be brought into the record they be allowed to plead to them. They would not, however, have your honors understand that they believe that either plaintiffs or themselves have the right to amend their pleadings in this court, and they respectfully insist that what plaintiffs are now seeking is essentially an amendment of their bill in two respects which plaintiffs seem to consider important.

And now, having fully answered, they pray to be hence dismissed.

CHAS. T. CATES, JR.,
J. W. CALDWELL,
Solicitors.

STATE OF TENNESSEE, }
County of Knox. }

Personally appeared before the undersigned authority Stephen P. Condon, and made oath in due form of law that the facts stated in the foregoing answer as of knowledge are true and those stated upon information and belief he believes to be true.

STEPHEN P. CONDON.

Sworn to and subscribed before me this April 24, 1903.

[Seal of Jno. F. Edington, Notary Public, Knox Co., Tenn.]

JNO. F. EDINGTON, *N. P.*